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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 971.

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, Successor Assignee, etc., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners, National Bank of Middlesboro, a corporation, and H. C. Williams, Successor Assignee in Trust for the Benefit of the Creditors and Stockholders of Louisville Property Company, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on February 7, 1944.

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court of the United States for the Eastern District of Kentucky (R. 101-104) are not officially reported. The opinion of the Circuit Court of Appeals (R. 116-122) is reported at 140 F. 2d 547.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 7, 1944 (R. 115). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Is a final decision of the Board of Tax Appeals, dismissing a petition on the ground that the petitioner is not the taxpayer against whom the tax was asserted, *res judicata* and binding upon the Courts when the government seeks to levy upon the property of the petitioner to collect taxes asserted against the said taxpayer?

2. When a corporation quits business and makes an assignment in trust of all its property for the benefit of its creditors, with any remainder over after its creditors are satisfied to go to its stockholders, is the assignee in trust "operating the property or business" *of the corporation* within the meaning of § 52 of the Revenue Act of 1936 so as to require him to render corporation returns of income and pay income taxes at corporation rates?

STATUTES INVOLVED.

The statutes involved are §§ 52, 142, and 161 of the Revenue Act of 1936 and §§ 1117, 1140, and 1142 of the Internal Revenue Code. The pertinent parts of these are printed in the Appendix, *infra*, pages 15 to 17.

STATEMENT OF THE CASE.

The Louisville Property Company, a corporation, was organized in 1898 for the purpose of owning and dealing in real estate. In 1919 it was involved in financial difficulties which resulted in a court order that it be liquidated and that, pending liquidation, it be placed in receivership. *Bernheim* v. *Louisville Property Co.*, 185 Ky. 63, 214 S. W. 801.

The interested parties all realized that receivership would dissipate the assets and agreed upon a plan whereby the Louisville Property Company assigned and conveyed in fee simple all of its property in trust for the benefit of its creditors, with any remainder over to go to its stockholders or their successors and assigns. (R. 89, 94-96.) The Company then published notice that it had *quit business and was winding up its affairs.* Since that time, it has had no property and has not engaged in business, but the corporation has been kept alive *solely* for the purpose of maintaining a register of the stockholders to be used in the case of distributions by the trustee. (R. 89-90.) A TRUST COMPANY administered the assets until in 1935 when it asked the Whitley Circuit Court (of Kentucky) to be discharged from its trust. The request was granted and on May 11, 1935, H. C. Williams of Middlesboro, Kentucky, was designated by said Court as successor assignee in trust and was directed to administer the remaining properties of the trust in accordance with the original terms of the trust created in 1919. The Circuit Court ordered that the action should be retained on its docket for such further proceedings as might be necessary and for settlement of the accounts of H. C. Williams and further ordered that the action proceed under the style of "H. C. Williams, Assignee of Louisville Property Company, et al." (R. 90.)

H. C. Williams has administered the assets since that time and has used the title which the court assigned to him. He has disposed of the assets from time to time as he could

without sacrificing them and has made regular reports to the court. H. C. Williams was not an officer, director, or stockholder of Louisville Property Company and made no reports to it. It made no demands upon him and has not exercised any authority over the assets conveyed to him. (R. 90-91.)

H. C. Williams has rendered income tax returns for the trust each year since he has been trustee. He used the fiduciary forms prescribed by the Commissioner of Internal Revenue for trusts and used the title fixed by the Court of "H. C. Williams, Assignee, Louisville Property Company". His return for 1937 disclosed a tax liability of $361.55, which tax he paid. (R. 91.)

The Commissioner of Internal Revenue held that H. C. Williams was operating the business or property of the corporation, Louisville Property Company, and that his income should be taxed at corporate rates (R. 22-26). He proceeded to compute the income tax on the corporate basis and arrived at a total tax liability for 1937 of $2,139.08. The Commissioner then mailed a statutory deficiency letter to "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky," giving notice therein of his determination (R. 22-26). Said letter was received by H. C. Williams, who, to protect his rights and the rights of the beneficiaries whom he represented, appealed therefrom to the Board of Tax Appeals (R. 16-26). The petition was captioned "H. C. Williams, Successor Assignee in Trust for the Benefit of the creditors and stockholders of Louisville Property Company, Petitioner, v. Commissioner of Internal Revenue", and was given Docket No. 100,467. Said petition alleged that "in so far as said notice of deficiency is held to assert a deficiency in tax against this petitioner, petitioner hereby petitions for a redetermination" (R. 16, 91-92).

The Commissioner of Internal Revenue filed a motion to dismiss the petition on sundry grounds (R. 27-28). After hearing on the motion, the Board on December 20, 1939,

entered an order of dismissal in which it dismissed the proceeding for lack of jurisdiction, because the tax was asserted against a corporation and the petition was filed by *a wholly different person* (R. 28-29). No appeal was taken from this order (R. 94).

After the Board's order of dismissal had become final, the Commissioner of Internal Revenue, made an assessment (R. 57) of tax against "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky" and sent a notice and demand for payment of this tax to H. C. Williams. Subsequently a distraint warrant drawn on "Louisville Property Company, H. C. Williams, Assignee, Middlesboro, Kentucky," for the amount of tax alleged to be due was served on him by a deputy collector (R. 92).

H. C. Williams refused to pay upon demand and distraint by the collector, and in May, 1941, the collector levied upon and seized an account of "H. C. Williams, Assignee, Louisville Property Company" in the National Bank of Middlesboro, Kentucky, in the amount of $2,131.58 for said assessment. H. C. Williams, etc., notified the bank that he was not liable for the tax assessed against Louisville Property Company, etc., and that it should not pay over the account to the collector (R. 92, 102).

On May 2, 1942, the United States filed suit in the District Court of the United States for the Eastern District of Kentucky against the National Bank of Middlesboro to compel it to turn over the said account (R. 1-3). Defendant answered that it had no account in the name of "Louisville Property Company, H. C. Williams, Assignee," but did have an account in the name of "H. C. Williams, Assignee, Louisville Property Company"; that it did not know the legal distinction between the one name and the other; and that it had no personal interest in the controversy and prayed the Court to instruct it in the premises (R. 4-6).

On July 8, 1942, H. C. Williams, Assignee, Louisville Property Company, filed a motion to intervene as the real

party in interest (R. 7-8) and tendered therewith its "Intervenor's Answer" (R. 9-29).

On August 4, 1942, the Court granted intervenor's motion to intervene and ordered the said intervenor's answer to be filed (R. 30).

Plaintiff thereafter filed a motion for summary judgment and attached thereto certain documents as evidence (R. 38-79). Intervenor also filed a motion for summary judgment with certain documentary evidence attached (R. 85-97). Plaintiff then made a request for admissions from intervenor under Rule 36 (R. 97-99) and intervenor replied thereto (R. 99-100).

On May 13, 1943 the District Court made its Findings of Fact and Conclusions of Law (R. 101-104) and entered judgment (R. 105) against defendant and for plaintiff in the sum of $2,131.58, with interest thereon at 6 per cent from May 23, 1941, and dismissed intervenor's petition. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court (R. 115).

SPECIFICATION OF ERRORS TO BE URGED.

The courts below erred:

1. In failing to hold that the order of the Board of Tax Appeals dismissing the petition of H. C. Williams, Successor Assignee, etc., is *res judicata* of this action.

2. In finding and holding that H. C. Williams, Successor Assignee, etc., was operating the business or property of the Louisville Property Company so as to make him, or the trust of which he was trustee, taxable as a corporation under § 52 of the Revenue Act of 1936.

3. In failing to hold that the United States may not levy upon, distrain against, and seize the property of one taxpayer for the taxes of another wholly different taxpayer.

REASONS FOR GRANTING THE WRIT.

1. The petition should be granted to settle the status of a decision of the Board of Tax Appeals (now The Tax Court of the United States) as applied to other judicial proceedings. The question is recurring and of general importance to taxpayers.

2. In denying to the decision of the Board of Tax Appeals the same effect as a *res judicata* holding of a court, the decisions below conflict with *Cook* v. *United States*, 5 Cir., 108 F. 2d 804, and with *Greenbaum* v. *United States*, 84 Ct. Cls. 77, 17 F. Supp. 83. As the Circuit Court explained in its opinion (R. 121), it had in *Nachod & United States Signal Co.* v. *Helvering*, 74 F. 2d 164, questioned—

> whether decisions of the Board of Tax Appeals have the binding force required by the doctrine of res judicata, a doctrine applicable to decisions of courts.

3. The decision below has failed to accord to the findings of fact of the Board of Tax Appeals the effect prescribed by *Dobson* v. *Commissioner*, 320 U. S. 489. It having been suggested that the effect of findings of fact by the Board of Tax Appeals should be further clarified,[1] it is submitted that the petition should be granted not only for this purpose but also to fix the status of such findings as to collateral proceedings in which the doctrine of *res judicata* is invoked.

4. Insofar as the decision below was based on § 52 of the Revenue Act of 1936 it is in conflict with *Commissioner* v. *Merchants National Building Corporation*, 5 Cir., 131 F.

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[1] *Denholm & McKay Realty Co.* v. *Commissioner*, 1 Cir., 139 F. 2d 545, 550. Cf. *Security Flour Mills Co.* v. *Commissioner*, ... U. S. ...., 64 S. Ct. 596, 599; *Smith* v. *Helvering*, ... U. S. App. D. C. .... F. 2d ...., decided February 14, 1944; and *Helvering* v. *Insular Sugar Refining Corp.*, ...U. S. App. D. C. ...., ... F. 2d ...., decided March 27, 1944.

2d 740,[2] and this Court should grant the petition to resolve the conflict between the Circuit Courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May, 1944.

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[2] It is, however, apparently in accord on this issue with *United States* v. *Metcalf*, 9 Cir., 131 F. 2d 677, relied on by the Court below (R. 120).